

JURISDICTION IN THE EUROPEAN UNION

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ABSTRACT

European Union has been compiling and approving concrete acts for decades, in order to arrange its competencies and jurisdiction. Within this framework, the first phases start with the approval of the Brussels Convention in the year 1968. This convention represents the first judicial act within this field. After that the European Union acted again in order to approve another act with the same goal as that of the Brussels Convention and it was finalized with the Luganos Convention of the year 1988. Brussels Convention was signed on 27 September, 1968, at the beginning, by the first eleven states of the European Community. Its objective in principle was foreseeing rules to define the judicial competencies and recognition of decisions in the civilian and commercial field. Later there were other states to enter and became part of the EU. This convention after some changes was completely transformed in the year 2000, by means of the Brussels Regulation No. 44, dated 22 December 2000 ("*Brussels I*" Regulation). But it actually entered into power on 1 March, 2002. This regulation made possible and more concrete, the application of rules to define the competencies of the court. "*Brussels I*" Regulation had the same objective that the Brussels Convention had. The criterion for the application of this regulation was to be in front of a disagreement of an inter-community character.

INTRODUCTION

"*Brussels I*" Regulation, aims at unity of the jurisdiction rules of the Member States courts, avoiding the difficulties in the application of the jurisdiction and reinforcing the legal protection of people. In this way, it allows for the one suing to identify more easily the court which he may choose to sue and the one getting sued to foresee the court where he may be sued.¹

Acceptance and Denial of the Jurisdiction

The issue is very delicate and a challenge, because different systems of law held different attitudes in this relation if they were to accept or not accept a certain jurisdiction. For that reason, there is no international consensus or such acts to discipline this field of law. The reasons why the courts decide to accept the jurisdiction to judge a case or decide not to accept depends on the special circumstances. These situations relate to the location of the sued person, the location of the real estate, execution of a decision and the possibilities to be done in another state, trying to avoid the superposition of competencies between courts located in different countries, etc.

EU Regulation over jurisdiction and recognition of the application of the decisions of civil and commercial courts, No. 44, Dated 22 December 2000 ("*Brussels I*" Regulation), foresees that in its content the rules must help at avoiding as much as possible the conflicts over jurisdiction. These conflicts may come because the states have their own rules to define the competent court, but also because these states are part of two systems deeply different, like

¹ Case C-125/92 [1993] ECR I-4075, Muloxvs.Geels

that of the common and civil law, where both are part of the European Union. Under this regulation it is sanctioned a very important principle. Like a general rule, the competent court which is to judge a case, is that of the most appropriate country to be judged. This principle brings along its own denial for the court that started the judgment, and will cease in favour of the most appropriate country's court. This is a completely different forecast from that civil law system, which does not take into account this principle that is based on the roots of the common law².

The aim of the principle is in fact different from what exist in the cornerstone of the "*Brussels I*" Regulation. Based on this principle, the Regulation tries to find an intermediate way of foreseeing the principle of "*lis pendens*"³. This principle seeks from all the courts, despite of the court where the suing was first introduced, to stop the process and give priority to the First Degree Court. This principle avoids parallel judgment for the same issue. Also this principle is not applicable in the countries of the common law system, but in those civil law systems where it is very widespread. The Regulation foresees that, in its Article 27. But this principle finds application only if the people in this process reside in the member states. Still, Article 21 of the Regulation is applied according to the European Court of Justice, despite the residence of the parties and it is sufficient for the ones getting sued, to be in one of the member states⁴. Combination of these two principles is very important.

The possibility of the parties to define the jurisdiction by means of agreement

Jurisdiction received from the approval of the parties in general when the parties undertake to define it, has a number of limitations for several reasons. Approval may be given in the form of a clause on the contract between the parties or in a special act. It may be given before the raise of the disagreement or after it has happened. Usually, the reliability of giving the approval to define the jurisdiction depends on the quality of the parties, if they are in business to business or business to the consumer relationships. These are the most important of the contractual relationships. Approval may be given in the form of the silent acceptance agreeing on the chosen court from the other party to judge the case, or it may be in the form of a clause foreseen in the content of the contract under a special article, or it may be in the form of an independent and written relationship between the parties that are already now in a contractual relationship.⁵ The choice of the jurisdiction in one of the foreseen ways mentioned above may be done into two different times, as also mentioned above. In order to assure the effectiveness of the defence policies, article 21 repeals every agreement over the jurisdiction in relation to an individual work contract, on two exceptions. According to this article it is foreseen that: "*Dispositions of this section may only be avoided through an agreement: on the first case it happened later than the agreement; on the second case it gives to the employer the possibility to go to a court different from those shown under this section*".⁶ The choice taken from both parties must be based upon article 21, which will dominate over the choices foreseen under articles 18, 19 and 20 of the "*Brussels I*" Regulation. However, the acceptance for the freedom of choice in this case is not absolute, but it has two conditions under the first paragraph of this article, where it is defined that the parties may make a

²ArtaMandro, Ganet Walker, ArdianKalia, "Private International Law". Tirana 2005. pp. 139

³Regulation Brussels, "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters ", Council Regulation no. 44/2001, Article 27

⁴ArtaMandro, GanetWalker, ArdianKalia, "Private International Law". Tirana 2005. pp. 141

⁵ArtaMandro, GanetWalker, ArdianKalia, "Private International Law". Tirana 2005. pp. 113

⁶Regulation Brussels, "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters ", Council Regulation No. 44/2001, Article 21

jurisdiction agreement, after the disagreement under discussion has taken place. This is a choice made to protect the weaker party. In this case, this article foresees the prevention on behalf of the employer in the case of the individual contract somehow to misuse the dominant position that has in this contract, being that the agreement at this point is already in place.

On the other hand it seems that this article makes an absolute stop, making invalid every agreement over jurisdiction, which happened before the disagreement. For this reason even on its second paragraph, it is emphasized that foreseeing the clauses for jurisdiction set before the disagreement started, is invalid. Therefore in this case the employee is allowed to proceed in other courts. "*Brussels I*", Regulation is applicable only for disagreements where the one getting sued is located, that is, where he resides in the European Union.⁷ So, it is not important at all, where is the party suing at the moment when the judgement starts at a court, but it is only sufficient that the sued party resides in one of the member states, and that is the place where there is the chance to sue.⁸ Similarly, the importance of the residence of the one getting sued, is also included in the Civil Procedure Code of the Republic of Albania, in its article number 42: "*The accusation is set in the court of the country where the one suing resides or stays, and when they are not known, in the court of the country where he temporarily lives*". This is not the only case of anticipation. We may say that similar are the articles 42 up to 43 of the Civil Procedure Code of the Republic of Albania⁹ with Articles 2 up to 4 of the "*Brussels I*" Regulation. But what is noticed is that there is a different treatment among those people that reside in one of the member states with the foreigners in the European courts.¹⁰

In the sixth section of the Regulation, under article 22, it is foreseen the exclusive jurisdiction¹¹. With such a disposition, this regulation has made a reservation, which means it is obligatory in a community level and directly applicable. In these cases, the jurisdiction may not be even solved by means of agreement between parties, because otherwise this clause is absolutely invalid.¹² This is a jurisdiction which one may not easily quit and which does not at all consider the general rule, that of the residence of the sued party.

In any case if a court has started the judgment of a case, which is one of the cases, foreseen in article 22 of the "*Brussels I*" Regulation, it must announce its incompetency, saying that it does not have jurisdiction to judge this case.¹³

If the parties, one or more of which reside in a member state, agreed to a court or the courts of a member state must have the jurisdiction to decide on each dispute, which has happened or is about to happen related to a judicial relationship, that court or those courts have the

⁷Regulation Brussels "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters" Council Regulation No. 44/2001, Article 2/1.

⁸ Sylvie Hennion, Muriel Le Barbier-Le Bris, Marion Del Sol, "European Social and International Law". Published by "PAPIRUS", Tirana 2010, pp 245.

⁹Civil Procedure Code of the Republic of Albania, approved by law no.8116, dated 29.3.1996 and changed by laws no.8431, dated 14.12.1998;no.8491, dated 27.5.1999; no.8535, dated 18.10.1999;no.8812, dated 17.5.2001; no.9953, dated 14.7.2008,no.10 052, dated 29.12.2008 October 2012.

¹⁰ArtaMandro, GanetWalker, ArdianKalia, "Private International Law".Tirana 2005.Pp. 96

¹¹Regulation Brussels"On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters". Council Regulation No. 44/2001, Article 22.

¹²ArtaMandro, Ganet Walker, ArdianKalia, "Private International Law".Tirana 2005.Pp. 76.

¹³Regulation Brussels, "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters ", Council Regulation no. 44/2001, article 25

jurisdiction to judge this disagreement¹⁴. This jurisdiction is exclusive and must be as such, except when the parties agree otherwise among themselves. An agreement among the parties which foresees the definition of the jurisdiction must be:

- a) in a written form or by written proof;
- b) in a form that is in compliance with the practices that the parties have established between them or
- c) in the international commerce, in a form that is in compliance with a custom for which the parties are or must be aware of and which, in this commerce, is widely known and regularly used by the parties in the contract of the type under consideration.¹⁵

Also, every communication with electronic means, which brings along a permanent registration of agreement defined by the jurisdiction, is valid and equivalent with an agreement made in a written form to define the jurisdiction.¹⁶ In the case when an agreement defined by the jurisdiction, agreed between the parties but that none resides in a member state, the courts of other member countries do not have the jurisdiction over the disagreement between the parties, except when the court chosen by means of an agreement between the parties, has refused the jurisdiction.¹⁷ Every agreement defined by the jurisdiction, does not have the legal power in case it is against articles 13, 17 or 21 of the "Brussels I" Regulation. Also, an agreement that defines the jurisdiction, does not have the legal power in case the court, the jurisdiction of which is exclusive for judging the case, based on the cases foreseen in article 22 of the "Brussels I" Regulation.¹⁸ It is the same case even in a written arbitration agreement between the parties, which defines the jurisdiction, where the parties based on the international acts have the right to define the law to be applied.¹⁹ The term "written agreement" will include a clause of arbitration in a contract, or in an arbitration agreement signed by the parties.²⁰

The European Code of Contracts

Movement for a harmonization of the European law of contracts has its roots at the beginning of the XX century, with different works in order to build academic projects.²¹ As in many other fields of the law, general laws of the member states contracts, of the European Union have come closer only with the passing of time. Above all, the foundations of the common European law for arranging the contract are laid²². At first, the so-called 'Lando' commission has published the European Principles of the law of the contract. Secondly, the Institution for the Unification of the private law (UNIDROIT) has developed the International Commercial Principles of the contract. Both the two groups of rules made the basis for the

¹⁴ Regulation Brussels, "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters ", Council Regulation no. 44/2001, article 23/1

¹⁵ Regulation Brussels, "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters ", Council Regulation no. 44/2001, article 23/2

¹⁶ Regulation Brussels, "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters ", Council Regulation no. 44/2001, article 23/3

¹⁷ Regulation Brussels, "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters ", Council Regulation no. 44/2001, article 23/4

¹⁸ Regulation Brussels, "On the jurisdiction and on Recognition and Enforcement of Judgments in Civil and Commercial Matters ", Council Regulation no. 44/2001, article 23/5

¹⁹ Law No. 8687, Dated 9.11.2000, Integration of the Republic of Albania into the "European Convention of Arbitration", Article 7

²⁰ Law No.8688, dated 9.11.2000. Integration of the Republic of Albania into the "European Convention of Arbitration" Article 2.

²¹ Ervin Pupe "Lectures Cycle on the Private Law of European Union", Pp. 42.

²² Lando & Beale, Principles of the European Law for the Contract (1993 , 1999 and 2000) .

common contractual European law, based on comparative research and functional analysis. In combination with the general trend of harmonization in the European Union, there is a stable convergence of the national law of contract.

This code is otherwise called the ‘Gandolfi’ Code, taking therefore the name of the professor who directed the work for its creation²³. This product was realized by the Academy of Studies for the European Private Law in Pavia (Italy). The first attempts must be said were those for the creation of the European Civil Code, but up to now, something similar is not realized yet. In the year 2004, project “The way forward” was presented. It aimed at creating a European Contractual Law, while before in the year 1998, was compiled by the Principles of the European Contractual Law. Below it will be analysed the viewpoint of these principles regarding the autonomy of the parties, which is one of the parts of the will autonomy.²⁴

Since the beginning we notice the aim of the Principles, to become a general rule in the EU. Further, it is defined the field of their application. They will be applicable if: the parties will agree on incorporating the principles in their contract, or the contract is fixed by these principles; contractors have accepted that their contract must be regulated by “the general principles of law”, *lex mercatoria* or something similar; they have not chosen any defined system of the law to fix their contract. For the contractual freedom the above act expresses that:

1. The parties are free to enter contractual relationships and in order to define its content, the subject of the request for trust and honest commerce, and mandatory laws established by means of these principles.
2. The parties may exclude the application of one of the Principles, or challenge them or change their consequences, with the exclusion of foreseeing these principles differently.”

Under this disposition it is noticed a greater freedom of the parties regarding the contract as compared to the Albanian Civil Code. Therefore, the parties for example, may exclude the application of one of the principles foreseen, or may change the consequences of one of them. The contractual freedom too, is viewed in the form of a contract, where the contractual parties are not asked for the written form of its compilation. However, the parties may not exclude the imperative norms that come out of such principles.²⁵ For example, imperative norm is the disposition over the conditions of contract, in which signing the contract is conditioned aiming at creating a legal relationship.²⁶

The Project of the Common Reference Structure (Draft Common Frame of Reference-DCFR)

Another attempt in the field of the contractual law is the compilation of the Project of the Common Reference Structure (*the Project is still in progress*)²⁷. It is a very big ambition that aims at creating same principles, definitions and rules models, in order to create the corpus of the European private law. Within this framework, the Project seems a continuance of the Principles of the European Contractual Law. On its foundation, there stand four principles:

²³ Ervin Puppe “Lectures Cycle on the Private Law of European Union”, Pp. 44.

²⁴ Principles of the European Law on Contract

²⁵ Art. 2:101/ 2 principles on the European Law on Contract

²⁶ Art. 2:101-1-a European Law on Contract

²⁷ Hanz-W. Micklitz, Fabrizio Cafaggi, “European Private Law after the Common Frame of Reference”, Edward Elgar Publishing Limited, 2010

freedom, safety, justice and efficiency.²⁸ It is an academic project for the elaboration of the European Civil Code. DCFR Project is composed of some parts: Principles, Definitions and European Rules Models. A characteristic is that the Project is not a political text, but rather an academic one. This is a product of the European legal schools initiative.

The DCFR authors hope that this text will serve as a source of law in the future, in order for improving the private relationship within the EU. The Project stays within the same line with the European Contractual Law Principles²⁹, Gandolfi Project, and European Law Principles over out-contractual obligations (PETL)³⁰, together with the European Insurance Group³¹. Regarding the freedom principle, its essence consists in the parties' autonomy. DCFR makes a similar prediction of the contractual freedom with the Principles, developing them further. The Project foresees that: "Parties are free to make a contract or another judicial action and define its content".

Every party is free to contract and expend the other contractual party. Parties are free to define the content of the contract and the rules of the shape that it will establish. Even under this act there are limitations of the contractual freedom, emphasizing that the contracts are in contradiction with the law or public order and are invalid. The Project however does not specify the cases, when we are found in front of such offences. Their non-specification of the cases is explained with the argument that this field is left to the external law of the DCFR field of action, and consequently it will be arranged by the national law of the member state.

CONCLUSIONS

Member countries in most cases are those that have some interest from the unification of the legislation in the field of the contractual law, aiming at favouring a better circulation of goods and services, and so that a functional area for justice and security is made possible. The ultimate aim is realizing a common European market with all its mechanisms. The autonomy of the parties implies a free initiative of the parties in the foundation of the civil judicial relationships. But not only this, it also implies even the freedom of the parties to choose by themselves, in their free will, which law will regulate the contract signed between them, and which jurisdiction they will have to undergo in order to solve the disagreements that may happen among them in the future.

Many judicial relationships are founded and depend on the legal dispositions, which are of obligatory character, or as such that despite the will of the subject, are acceptable in the judicial civil relationships. But, the judicial civilian subjects establish if they will enter into any judicial civilian relationships, with anyone and when they will enter, what will that be, what is key to their contract, and what will be of second hand, etc. Harmonizing instruments oblige the states to change the essence of their law about the contractual autonomy. Legal acts are at the same time coordinative and regulative ones, and relate only to EU

²⁸The Project for the Common Structure of the Reference

²⁹Ole Lando and Hugh Beale (eds.), Principles of European Contract Law, Parts I and II (2000).

³⁰European Group of Tort Law (eds.), Principles of European Tort Law, Text and Commentary (2005), Look at Alpha, EBLR 2005, 957; Wagner, (2005) 42 CMLR, 1269; van den Bergh and Visscher, ERPL 2006, 511; Jansen, ZEuP, 2007, 398; Schulz, EBLR 2007, 1305.

³¹Helmut Heiss, 'The Common Frame of Reference (CFR) of European Insurance Contract Law', in: Schulz (ed.), Common Frame of Reference and Existing EC Contract Law (2008), p. 229. Also look at: 'European Insurance Contract Law and DCFR' in ERA Forum (2008), Scripta iuris europaei, European Contract Law, Special Issue, 'Towards a Common Frame of Reference (CFR) European Insurance Contract Law and the CFR', pp. 595

countries.³² Harmonization may be in the form of “unification” or “minimal harmonization”. Unification, otherwise called even “standardisation”, seeks for all the national systems to have the same rules. Whereas the minimal harmonization is achieved only through establishing minimal standards and in the meantime, the states are free to ensure an even higher level, if they wish so. Brussels Convention, which was later substituted by "*Brussels I*" Regulation, are acts with an indisputable importance in the arrangement they have done and do, to the private international law of the European Union.

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³²Pieters D. and Vansteenkiste S "The thirteenth State" Towards a European Community Social Insurance Scheme for Intra-Community Migrants, Leuven, Acco, 1993